Supreme Court, U.S.
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No. 01-881

IN THE

Supreme Court of the United States

GENERAL ELECTRIC CAPITAL CORP., d/b/a GE CAPITAL, MONTGOMERY WARD CREDIT SERVS., INC., f/k/a, MONOGRAM RETAILER CREDIT SERVICES, INC.,

Petitioners,

v.

GARY A. THIESSEN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

As the petition demonstrated (Pet. 9-16), the decision below deepens a circuit split on the question whether a district court may make factual findings on class certification issues that overlap with the merits of the case. Petitioners further demonstrated (Pet. 16-24) that the decision below deepens a circuit split on the question whether a district court must use the multi-stage trial plan embraced in *Teamsters v. United States*, 431 U.S. 324 (1977), in deciding whether to certify a class seeking to litigate juriable claims for legal relief. Finally, petitioners showed (Pet. 25-30) that the decision below deepens circuit splits on three distinct questions concerning the "continuing violation" doctrine — (1) whether that doctrine can be applied to resurrect a single plaintiff's stale claims; (2) whether that doctrine can be applied to resurrect the stale claims of other putative plaintiffs; and (3) whether that doctrine applies to discrete employment actions, such as terminations. The *amici* filings of the U.S. Chamber of Commerce, the National Association of Manufacturers, and the Washington Legal Foundation confirm the importance of these issues and the need for this Court's prompt attention to them. Respondent's opposition is unfounded.

1. Respondent initially errs in suggesting (Opp. 1-2) that review by this Court is premature because "[n]o final ruling has been made" and "[t]he law and facts of this case are not fully developed . . . ." The district court here entered a final judgment disposing of the entire case, dismissing eight putative plaintiffs on timeliness grounds, decertifying the remainder of the putative class, and granting summary judgment against the principal plaintiff. Based upon the record that already exists, the court below then held that, in doing so, the district court had committed three distinct legal errors. The court below did not envision that further proceedings in this case would in any way affect these three legal rulings. This case thus fits squarely into the category of interlocutory judgments that this Court routinely reviews. *See* Stern, Gressman, Shapiro & Geller, *Supreme Court Practice* 196 (7th ed. 1993) ("where . . . there is some important and

clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari, the case may be reviewed despite its interlocutory status") (citing numerous cases).

2. Respondent next argues (Opp. 2-10) that this case does not properly present the question whether a district court may make factual findings on class certification issues that overlap with the merits. This argument is in error.

a. Contrary to respondent's suggestion, it does not matter that this case is technically subject to 29 U.S.C. § 216(b) rather than to Rule 23 of the Federal Rules of Civil Procedure. The decision below is not so limited. As the court below noted (Pet. App. 8a-10a), this Court and others routinely look to Rule 23 authorities in deciding questions under 29 U.S.C. § 216(b). *See, e.g., Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 171 (1989); *Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1213-15 (5th Cir. 1995). Moreover, in deciding this case, the court below expressly held that "there is little difference" between Section 216(b) and Rule 23 and that both provisions "allow for consideration of the same or similar factors, and generally provide a district court with discretion to deny certification for trial management reasons." Pet. App. 13a. Even more critically, in holding that the district court here erred in making "findings" on certification issues that overlap with the merits, the court below expressly relied on Rule 23 cases. Pet. App. 16a. Indeed, while respondent makes rhetorical use of the Section 216(b)/Rule 23 distinction, he nowhere suggests that this distinction makes any difference in the analysis. Accordingly, this case is an excellent vehicle for addressing the question whether a district court may properly make findings on class issues that overlap with the merits, as the court below effectively held that *neither* Section 216(b) nor Rule 23 allow a district court to do so.

b. Respondent further errs in suggesting (Opp. 3-4) that the question whether a district court may make findings on class issues that overlap with the merits is not presented,

because the district court's error here was in going further and deciding the ultimate question of discrimination itself. As the district court stated:

> Contrary to plaintiffs' position, the court is not resolving the underlying merits of plaintiffs' claims. In requiring evidence of a link between the policy and the challenged employment actions, the court does not determine whether plaintiffs may individually state a cause of action or whether plaintiffs may ultimately prevail on the merits. . . . The court is simply determining whether the requirements of § 216(b) have been satisfied where, as here, plaintiffs concede that the only possible common thread among the plaintiff group is the existence of the blocker policy and adverse job actions which plaintiffs attribute, without more, to the application of the policy.

Pet. App. 62a. In reversing the district court, the Tenth Circuit did not take issue with this statement or deny that the district court's finding concerned whether common claims were actually presented. Rather, the Tenth Circuit held that the district court could not make such commonality findings because they *also* "necessarily encompasse[d] factual issues relevant to" the merits. *See* Pet App. 15a-16a; *see also* Pet App. 10a-12a. Thus, the circuit conflict is squarely presented.

c. For similar reasons, respondent plainly errs in disputing (Opp. 4-6, 7-9) that the decision below is in conflict with the decisions of other courts. As noted in the petition (at 10-13), the Third, Fourth, Fifth and Seventh Circuits have held that a district court *must* make factual findings on all issues necessary for a proper class determination, even if those issues overlap with the merits.

Contrary to respondent's suggestion (Opp. 4-8), the decisions in *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995), and *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672 (7th Cir.), *cert. denied*, 122 S. Ct. 348 (2001), cannot be distinguished on the ground that the former involved "mass

tort" litigation and the latter involved "breach of warranty and fraud." Nor can they be distinguished by reference to the volume of the records in the respective cases, respondent's perception of the strength of his evidence of alleged discrimination, or the precise stage of the proceedings at which the class certification decision is made. These distinctions proffered by respondent are irrelevant to the core legal question whether a district court may make findings on class issues that overlap with the merits — and that is the question on which the Seventh Circuit and the court below directly conflict. *Compare Rhone Poulenc*, 51 F.3d at 1299-1300, and *Szabo*, 249 F.3d at 675-77, *with* Pet. App. 15a-16a.

Likewise, respondent's attempt (Opp. 8-9) to minimize the conflict between the decision below and *Stastny v. Southern Bell Telephone & Telegraph Co.*, 628 F.2d 267 (4th Cir. 1980), does not withstand analysis. Again, contrary to respondent's assertion, it is immaterial that the trial court in *Stastny* made its findings on class certification at trial. What matters is that the Fourth Circuit squarely held that because "the class action and merit inquiries essentially coincide," a "fair determination of the propriety of class action may be exceedingly difficult without conducting an inquiry roughly comparable to that required to resolve the 'pattern and practice' issue on the merits" (*id.* at 274), which is the very inquiry that the decision below bars as a matter of law. Indeed, respondent's concession (Opp. at 8) that "it was permissible for the Court [in *Stastny*] to make factual determinations concerning class requirements" is fatal to his defense of the decision below.

Respondent's argument (Opp. 9) that there is no conflict between the decision below and the Fifth Circuit's decision in *Mooney* is similarly mistaken. While the Fifth Circuit in *Mooney* did not endorse any specific criteria for the "similarly situated" inquiry, it sanctioned the substantial factfinding on certification issues in which the district court there engaged, even though those issues overlapped the merits of that ADEA

case. *See* 54 F.3d at 1214-16. *Mooney* and the decision below are thus irreconcilable.

d. Finally, respondent erroneously suggests (Opp. 9-10) that the question presented is not a "recurring problem" requiring this Court's prompt attention. Contrary to respondent's position, the issue is not precisely how many *employment* class actions are pending in the federal courts, but rather is how many class actions *of all subject matter* are pending. As respondent's own discussion indicates, there are thousands pending, and thousands more filed each year. Thus, as the *amici* filings confirm (WLF Br. 5, 17; Chamber Br. 4, 17), the question whether a district court may make factual findings on certification issues that overlap with the merits is profound — especially in light of the immense pressure for the defendant to settle once a class is certified, *see, e.g., Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978). The importance of the issue is in fact confirmed by the pendency of another petition raising the same issue. *See Robinson v. Metro-North Commuter R.R.*, 267 F.3d 147, 163-64 (2d Cir.), *pet. for cert. filed*, 70 U.S.L.W. 3429 (Dec. 17, 2001) (No. 01-908). This Court's immediate review is warranted.

3. Respondent next contends (Opp. 10-15) that this case is not a proper vehicle for resolving the split regarding whether a district court must use the multi-stage trial plan embraced in *Teamsters* in deciding whether to certify a class seeking legal relief on juriable claims. This contention also is in error.

a. Contrary to respondent's suggestion (Opp. 10), this case directly presents the circuit split posed by the petition. While the cases cited in the petition arose under various laws in Rule 23 cases, those cases did not turn on the nuances of the particular laws or on the fact that they were Rule 23 cases (as opposed to cases under other collective action rules). Rather, those cases turned on their determination that, in the context of juriable claims seeking legal relief, a district court is not required to apply, and may abuse its discretion if it applies, the *Teamsters* multi-stage trial plan in deciding whether to certify

a class. *See, e.g., Rutstein v. Avis Rent-A-Car Sys., Inc.*, 211 F.3d 1228, 1239 (11th Cir. 2000) (42 U.S.C. § 1981), *cert. denied*, 121 S. Ct. 1354 (2001); *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 421-22 (5th Cir. 1998) (Title VII); *see also Lusardi v. Xerox Corp.*, 118 F.R.D. 351, 373-80 (D.N.J. 1987) (ADEA), *rev'd in part on other grounds*, 855 F.2d 1062 (3d Cir. 1988). In contrast, although the district court here held (Pet. App. 121a, 124a) that application of the *Teamsters* multi-stage trial plan to juriable ADEA claims for legal relief would be unmanageable, prejudicial and subject to serious constitutional challenges, the Tenth Circuit held (Pet. App. 13a-18a) that application of the *Teamsters* multi-stage trial approach is mandatory. This holding presents a square conflict about the proper application of *Teamsters*. That these juriable claims for legal relief arose under the ADEA rather than Title VII (or Section 1981) was of no significance to the Tenth Circuit, and thus has no bearing on the appropriateness of certiorari review.

b. Respondent errs in suggesting (Opp. 10-12) that "this case is not a proper vehicle for resolving" the circuit split because, "[i]n this ADEA case, compensatory damages are unavailable." This misstates the circuit split. The issue is not whether the *Teamsters* multi-stage trial plan is mandatory in cases involving compensatory damages. Rather, as the petition explains (Pet. 16-20), the circuit split is about whether the *Teamsters* multi-stage trial plan is mandatory in cases involving *juriable* claims for *legal* relief. This Court has held that ADEA claims for back pay and liquidated damages are juriable claims for legal relief. *See, e.g., Lorillard v. Pons*, 434 U.S. 575, 578-84 (1978); *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 537 (1999) (applying ADEA liquidated damages standard to punitive damages under Title VII). Thus, this case squarely joins issue on the question dividing the circuits.

c. Respondent further errs in arguing (Opp. 11) that the Fifth Circuit's withdrawal of its opinion in *Smith v. Texaco,*

Inc., 263 F.3d 394 (5th Cir. 2001), *op. withdrawn*, 2002 WL 131415 (Feb. 1, 2002), diminishes the degree of judicial conflict over the question presented. *Smith* was withdrawn only because the parties settled. *See* 2002 WL 131415, at *1. Moreover, *Smith* itself merely restated prior Fifth Circuit precedent that continues to conflict with the Tenth Circuit's decision below. For example, in holding (263 F.3d at 409-10) that "applying *Teamsters* to require certification was improper, since the case 'as a whole' must satisfy the certification requirements," *Smith* was relying upon *Castano v. American Tobacco Co.*, 84 F.3d 734, 745 n.21 (5th Cir. 1996). Likewise, *Smith* looked to *Allison*, 151 F.3d at 419-20, in holding that the need for "individualized proof" counseled strongly against certification. 263 F.3d at 410, 413. And, *Allison*, in turn, relied upon *Castano* for the proposition — recounted in *Smith*, 263 F.3d at 410 — that, "[u]nder such circumstances, an action conducted nominally as a class action would 'degenerate in practice into multiple lawsuits separately tried.'" 151 F.3d at 419 (quoting *Castano*, 84 F.3d at 745 n.19). In fact, the Second Circuit, which agrees with the Tenth Circuit's position on this point (Pet. 17-18), recognized *Smith* as a mere restatement of existing Fifth Circuit law in declining to follow both *Smith* and *Allison*. *See Robinson*, 267 F.3d at 163-64.

d. Respondent similarly errs (Opp. 11-12) in his misguided effort to distinguish *Rutstein*. While *Rutstein* noted that *Teamsters* is applied primarily in employment discrimination cases, it held that *Teamsters* was inapplicable where juriable claims for legal relief are involved, because, "*more important[ly]*, the relief to which individual plaintiffs were entitled after a finding of a pattern or practice of discrimination in *Teamsters* (and in all subsequent cases employing the *Teamsters* rationale) was *equitable* in nature." *Id.* at 1239 (emphasis added). The *Rutstein* court noted that "[t]he *Teamsters* framework is, therefore, inappropriate" where "establishment of a policy or practice of discrimination cannot trigger the defendant's liability for damages to all the

plaintiffs in the putative class. . . . The idea that individual injury could be settled on a class-wide basis is preposterous." *Id.* *Rutstein*'s conflict with the decision below is stark. *See also Murray v. Auslander*, 244 F.3d 807, 812 (11th Cir. 2001) ("[A]ssessing damages for these inherently individual injuries compels an inquiry into each class member's individual circumstances."); *Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999, 1006 (11th Cir. 1997) ("plaintiffs' claims will require distinctly case-specific inquiries into the facts surrounding each alleged incident of discrimination").

e. Respondent erroneously contends (Opp. 1-2, 13-15) that this case is a poor vehicle for addressing the *Teamsters* issue because only 28 plaintiffs are involved. But the district court here found that, because of the widely-varying circumstances of the plaintiffs, "this case may be in danger of passing" the "realistic limit on what a jury may reasonably be expected to absorb, retain, and process," and that, in these circumstances, a *Teamsters* bifurcation "would be unduly prejudicial to the defendants" and "would be subject to serious constitutional challenges." Pet. App. 121a, 124a; *see also* Pet. App. 75a-76a. Thus, while respondent may not believe that 28 plaintiffs can create case management and/or constitutional problems, the district court here found to the contrary. In light of the district court's findings on these critical issues, the case presents an ideal vehicle for deciding whether the *Teamsters* multi-stage trial plan is mandatory where juriable claims for legal relief are involved.

f. Finally, respondent does not contest the importance of the *Teamsters* issue. Nor could he. As *amici* filings by the Chamber of Commerce, National Association of Manufacturers, and Washington Legal Foundation make clear, the *Teamsters* issue has great importance and arises with great frequency. *See* WLF Br. 16-17; Chamber Br. 4, 10. It is an issue with which lower courts have struggled, in large part because this Court has never considered *Teamster*'s applicability to juriable claims for legal relief. Accordingly,

there is little prospect of the circuit split resolving without guidance from this Court. Particularly given the constitutional dimension of the issue, that guidance should be provided immediately.

4. Respondent never seriously disputes any of the three circuit splits or the recurrence and importance of the issues surrounding the Tenth Circuit's application and extension of the "continuing violation" doctrine. Indeed, respondent never even mentions the third timeliness conflict regarding application of the "continuing violation" doctrine to instances of discrete adverse employment actions, such as terminations or failures to promote. Respondent instead opposes certiorari almost entirely on case-specific grounds that are meritless.

a. Respondent first suggests (Opp. 15-16) that the timeliness issues raised by the petition are not ripe for review because, in remanding to the district court, the Tenth Circuit held that claims arising more than 300 days prior to the filing of respondent's EEOC charge will be untimely if plaintiffs cannot establish that the alleged pattern or practice of discrimination continued into the charge-filing period. Pet. App. 19a-20a & n.9, 21a-24a. But the question whether *any* pre-charge-filing claims of respondent may be the basis for recovery, even if the alleged pattern or practice continued into the charge-filing period, is plainly ripe for review. Likewise, whether the claims of the eight opt-in plaintiffs which arose entirely outside of the charge-filing period may be the basis for recovery is also a question plainly ripe for review. Those claims were held untimely by the district court; and the Tenth Circuit's use of the "continuing violation" doctrine to revive them conflicts with the decisions of other courts. That the claims may yet fail on *other* grounds does not lessen the judicial conflict or alter the significance of the Tenth Circuit's ruling on this particular ground. As this Court has recognized numerous times, that potentially dispositive questions will remain after this Court's decision is a reason for remanding after reversal, not for denying certiorari. *See, e.g., TRW, Inc.*

v. Andrews, 123 S. Ct. 441, 451 (2001); *Cooper Indus. Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 431 (2001).

b. Respondent likewise errs in his effort (Opp. 16-18) to distance this case from *National Railroad Passenger Corp. v. Morgan*, No. 00-1614. To the extent that respondent argues that *Morgan* concerns only the application of the "continuing violation" doctrine where an individual is subject to alleged "serial" violations, he in fact confirms that this case presents a distinct question meriting this Court's review — namely, whether the "continuing violation" doctrine may be used to revive the otherwise stale claims of class members who, as alleged here, are victims of a "pattern or practice" of discrimination. Moreover, to the extent that respondent argues that *Morgan* will itself potentially address or resolve all of the three legal questions raised by the Tenth Circuit's application of the "continuing violation" doctrine, the appropriate and standard course of action is to hold the petition until *Morgan* has been decided. The case should not be sent back to the district court until the many circuit conflicts raised by the decision below have been resolved.

c. Finally, respondent errs in suggesting (Opp. 17) that the decision below is not in conflict with *Hipp v. Liberty National Life Insurance Co.*, 252 F.3d 1208 (11th Cir. 2001), *cert. denied*, 2002 WL 232923 (Feb. 19, 2002). *Hipp* holds that a plaintiff *cannot* "revive a stale claim simply because the allegedly discriminatory policy still exists and is being enforced against others." *Id.* at 1221. That holding conflicts with the decision below and, as explained in the petition (at 27-28), presents a question requiring prompt review by this Court. Because *Morgan* does not appear to present this recurring question, the Court should grant this petition to resolve the circuit conflict.

CONCLUSION

For the foregoing reasons and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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